

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 19, 2005 Session

**LYNDA GRISHAM v. STEVEN G. McLAUGHLIN ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 03C-2233     Barbara N. Haynes, Judge**

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**No. M2004-01662-COA-R3-CV - Filed on June 12, 2006**

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This appeal involves a medical malpractice action arising from knee replacement surgery. The patient filed suit against her surgeon in the Circuit Court for Davidson County in August 2003. Approximately four months later, the surgeon filed a motion for summary judgment supported by his own affidavit. The patient requested a continuance of the hearing on the summary judgment motion to depose the surgeon. The surgeon renewed his summary judgment motion on the day after his deposition. Prior to the hearing, the patient requested another continuance because the surgeon's deposition had not yet been signed and because the patient's expert had not yet had an opportunity to review the deposition. The trial court declined to grant the continuance. The court also granted the surgeon's summary judgment motion after concluding that there were no material factual disputes because the patient had failed to present an expert affidavit contradicting the surgeon's affidavit. The patient filed a Tenn. R. Civ. P. 59.04 motion accompanied by an affidavit opposing the summary judgment motion. After the trial court denied that motion, the patient appealed. We have determined that the summary judgment must be vacated because, under the facts of this case, the patient was not provided an adequate opportunity to respond to the surgeon's summary judgment motion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

R. Stephen Doughty, Nashville, Tennessee, for the appellant, Lynda Grisham.

C.J. Gideon, Clare T. Smith, and Kenneth P. Flood, Nashville, Tennessee, for the appellees, Steven G. McLaughlin and Premier Orthopaedic & Sports Medicine, PLC.

**OPINION**

**I.**

Lynda Grisham suffered from persistent pain in her left knee. After several surgical procedures on her knee failed to relieve her discomfort, she sought treatment from Dr. Steven G.

McLaughlin, an orthopaedic surgeon practicing in Nashville with Premier Orthopaedic & Sports Medicine, PLC (“Premier Orthopaedic”).

Ms. Grisham’s first office visit with Dr. McLaughlin occurred on July 24, 2001. Dr. McLaughlin ordered an MRI and, based on the results, prescribed a brace and a regimen of physical therapy. After these treatments proved unsuccessful, Dr. McLaughlin prescribed a variety of injections and other medications. When Ms. Grisham continued to have discomfort, Dr. McLaughlin broached the subject of a total knee replacement. Ms. Grisham eventually informed Dr. McLaughlin that she desired to proceed with total knee replacement surgery.

On May 20, 2002, Dr. McLaughlin performed total knee replacement surgery on Ms. Grisham’s left knee. Ms. Grisham began physical therapy following surgery, but the degree of flexion in her knee decreased rather than increased. Dr. McLaughlin attempted unsuccessfully to increase the degree of flexion in Ms. Grisham’s left knee on several occasions. However, by August 2002, Ms. Grisham was experiencing pain in her left knee and lacked the desire to continue therapy to increase the flexion in her left knee. An x-ray revealed a fracture in her left knee which Dr. McLaughlin treated with a brace.

Ms. Grisham became dissatisfied with the treatment she was receiving from Dr. McLaughlin and consulted another orthopaedic surgeon, Dr. Joseph D. Chenger. Dr. Chenger determined that Ms. Grisham’s femur was fractured and treated the fracture by immobilizing her left knee. The flexion in Ms. Grisham’s knee decreased. On December 11, 2002, Dr. Chenger performed a second total knee replacement surgery on Ms. Grisham and inserted a new prosthesis into her left knee.

On August 5, 2003, Ms. Grisham filed a medical malpractice complaint against Dr. McLaughlin and Premier Orthopaedic in the Circuit Court for Davidson County. She alleged that Dr. McLaughlin failed to comply with the standard of care for orthopaedic surgeons and physicians in Davidson County and that Premier Orthopaedic was vicariously liable for Dr. McLaughlin’s negligence. Dr. McLaughlin and Premier Orthopaedic filed their answer on October 8, 2003, after the entry of an agreed order extending the time for filing their answer.

On November 25, 2003, Dr. McLaughlin and Premier Orthopaedic filed a motion for summary judgment, along with a statement of undisputed material facts and an affidavit from Dr. McLaughlin stating that he had not departed from the recognized standard of professional practice in his treatment of Ms. Grisham. The trial court set a hearing on the summary judgment motion for January 16, 2004. On January 7, 2004, Ms. Grisham filed a Tenn. R. Civ. Proc. 56.07 motion to continue the hearing because she desired to depose Dr. McLaughlin and needed more time to respond to the summary judgment motion. Ms. Grisham also filed an affidavit by her attorney stating that he would be unable to attend a hearing on January 16, 2004 because he was scheduled to try a case in another county.

On January 9, 2004, Dr. McLaughlin and Premier Orthopaedic responded to Ms. Grisham’s motion to continue the summary judgment hearing. They opposed the motion on the ground that Ms. Grisham had not served any discovery requests on them and had not responded to their written interrogatories or requests for production. On January 12, 2004, Ms. Grisham filed a memorandum

in support of her motion, arguing that she had not missed any discovery deadlines and that giving her additional time to respond to the summary judgment motion would not prejudice either Dr. McLaughlin or Premier Orthopaedic. Ms. Grisham's lawyer also filed another affidavit stating that he had been forced to notice Dr. McLaughlin for a deposition on January 26, 2004 because Dr. McLaughlin had failed to respond to his requests. He also stated that Ms. Grisham's responses to Dr. McLaughlin's and Premier Orthopaedic's discovery requests would be submitted on January 12, 2004.

The trial court conducted a hearing on January 16, 2004, and took Ms. Grisham's motion for an extension of time under advisement. Later, on February 4, 2004, the trial court conducted a scheduling conference. In an agreed order filed on February 10, 2004, the parties agreed to the following deadlines: (1) written discovery would be completed by July 1, 2004; (2) all experts for Ms. Grisham and their statements would be disclosed by August 1, 2004; (3) all experts for Dr. McLaughlin and Premier Orthopaedic and their statements would be disclosed by October 15, 2004; (4) all expert discovery depositions would be completed by December 15, 2004; (5) all depositions would be completed by January 15, 2005; and (6) a trial date must be obtained on or before November 1, 2004. Contrary to the trial court's normal practice, the scheduling order did not include a date on which the summary judgment motion would be heard.

Dr. McLaughlin eventually responded to Ms. Grisham's notice for deposition by asserting that the earliest he could be available to give a deposition would be sometime in March 2004. Accordingly, both Dr. McLaughlin and Ms. Grisham were deposed on March 11, 2004. Dr. McLaughlin refused to waive signature. On March 12, 2004, Dr. McLaughlin and Premier Orthopaedic filed a motion to dispose of their pending summary judgment motion. They asserted that no material factual disputes existed because Ms. Grisham had failed to file an expert affidavit opposing Dr. McLaughlin's affidavit. Thus, a hearing on Dr. McLaughlin's and Premier Orthopaedic's summary judgment motion was set for March 26, 2004 – fifteen days after Dr. McLaughlin's deposition.

On March 22, 2004, Ms. Grisham filed a memorandum in opposition to the March 26, 2004 hearing. She pointed out that Dr. McLaughlin had not made himself available for a deposition until March 11, 2004 and that she had ordered a copy of Dr. McLaughlin's deposition but that it had not yet been received. Three days later, on March 25, 2004, Ms. Grisham's lawyer filed another affidavit stating that he had received an unsigned draft of Dr. McLaughlin's deposition and that he had forwarded a copy of the deposition to his expert for review.

The trial court held a hearing on Dr. McLaughlin's and Premier Orthopaedic's motion on March 26, 2004 despite Ms. Grisham's objections. In an order filed on April 5, 2004, the trial court granted a summary judgment for Dr. McLaughlin and Premier Orthopaedic because no genuine dispute of material fact existed due to Ms. Grisham's failure to file an expert affidavit to rebut Dr. McLaughlin's affidavit. The court noted critically that Ms. Grisham had failed to initiate discovery immediately after filing her complaint.

On May 4, 2004, Ms. Grisham filed a Tenn. R. Civ. P. 59.04 motion to alter or amend. In support of her motion, she attached an affidavit from Dr. Nancy Garber stating that Dr.

McLaughlin's decision to perform total knee replacement surgery on Ms. Grisham fell below the applicable standard of professional practice in light of the x-ray findings in the record and that the fracture of Ms. Grisham's femur, the treatment of that fracture, all subsequent surgeries, and the greatly reduced range of motion in Ms. Grisham's left knee would not have occurred had Dr. McLaughlin not performed total knee replacement surgery. The trial court filed an order on June 15, 2005 denying Ms. Grisham's Tenn. R. Civ. P. 59.04 motion. The trial court stated that Dr. Garber's affidavit was based "entirely on medical records" which had been available to Ms. Grisham long before she filed suit. The trial court also chastised Ms. Grisham for failing to demonstrate that she had been exercising due diligence or to explain why she failed to file Dr. Garber's affidavit before the March 26, 2004 hearing. Ms. Grisham has appealed.

## II.

### THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT MOTIONS

The standards for reviewing summary judgments on appeal are well settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion: that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

The party seeking a summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *Shadrick v. Coker*, 963 S.W.2d 726, 731 (Tenn. 1998). To be entitled to a judgment as a matter of law, the moving party must either affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Byrd v. Hall*, 847 S.W.2d at 215 n.5; *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

Summary judgments enjoy no presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001). Accordingly, appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

### III.

#### THE TRIAL COURT'S DENIAL OF MS. GRISHAM'S MOTION SEEKING ADDITIONAL TIME TO OBTAIN AN OPPOSING AFFIDAVIT

Ms. Grisham first takes issue with the trial court's refusal to provide her with sufficient time to conduct discovery before responding to Dr. McLaughlin's and Premier Orthopaedic's summary judgment motion. Dr. McLaughlin and Premier Orthopaedic respond that the trial court gave Ms. Grisham more than sufficient time to obtain an affidavit opposing their motion for summary judgment and that the trial court properly granted the motion after Ms. Grisham failed to file an affidavit contradicting the assertions in Dr. McLaughlin's affidavit. In light of the facts of this case, we have concluded that the trial court did not provide Ms. Grisham with a reasonable opportunity to obtain an affidavit to oppose the summary judgment motion.

#### A.

Medical malpractice claims must meet strict substantive and procedural requirements. *Hessmer v. Miranda*, 138 S.W.3d 241, 244 (Tenn. Ct. App. 2003). Subject to the "common knowledge" exception, a patient filing a medical malpractice action cannot recover unless he or she presents competent expert evidence establishing each of the three statutory elements of a medical malpractice claim. Tenn. Code Ann. § 29-26-115 (Supp. 2005); *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 92 (Tenn. 1999). Specifically, the patient must present expert evidence (1) establishing the applicable standard of care, (2) demonstrating that the defendant's conduct fell below that standard of care, and (3) showing that the defendant's conduct proximately caused injuries that would not otherwise have occurred. Tenn. Code Ann. § 29-26-115(a)(1)-(3); *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 226 (Tenn. Ct. App. 1999).

As we have previously noted, it is now commonplace for defendants in medical malpractice cases to file motions for summary judgment to test the strength of their adversary's case. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Kenyon v. Handal*, 122 S.W.3d 743, 758 (Tenn. Ct. App. 2003). Medical professionals named as defendants frequently support their summary judgment motions with their own affidavits stating that, in their own professional opinion, their actions neither violated the applicable standard of professional practice nor caused the complained-of injury. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Kenyon v. Handal*, 122 S.W.3d at 758 & n.14. Affidavits of this sort effectively negate the allegations of negligence in the patient's complaint and force the patient to demonstrate the existence of a genuine, material factual dispute that warrants a trial. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 438 (Tenn. 1998); *Dunham v. Stones River Hosp., Inc.*, 40 S.W.3d 47, 51 (Tenn. Ct. App. 2000).

Demonstrating the existence of a genuine, material factual dispute can be challenging in a medical malpractice case. A patient faced with a properly supported summary judgment motion cannot rest on the allegations in the complaint, Tenn. R. Civ. P. 56.06; *Byrd v. Hall*, 847 S.W.2d at 210; *Blocker v. Reg'l Med. Ctr.*, 722 S.W.2d 660, 661 (Tenn. 1987), but instead must demonstrate the existence of triable factual disputes by either: (1) pointing to evidence ignored or overlooked by the defendants; (2) rehabilitating evidence attacked by the defendants; or (3) producing additional

evidence establishing the existence of a genuine factual issue. *Kenyon v. Handal*, 122 S.W.3d at 758.

In other words, the patient must point to or produce expert testimony establishing the applicable standard of care, the defendant's violation of that standard, and a causal connection between the defendant's conduct and the plaintiff's injury. *Hessmer v. Miranda*, 138 S.W.3d at 244. The patient who is unable to do so faces almost certain dismissal of the complaint, because the defendant has effectively negated one or more essential elements of the patient's case. Without opposing expert testimony, the patient cannot demonstrate the existence of a genuine factual dispute regarding whether the defendant breached the applicable standard of professional practice or caused the plaintiff's injuries. *Hessmer v. Miranda*, 138 S.W.3d at 244; *Kenyon v. Handal*, 122 S.W.3d at 758; *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997).

## B.

This case presents another example of the tug-of-war that patients and health care professionals in medical malpractice cases often engage in with regard to the timing of summary judgment motions and discovery. Health care professionals normally file summary judgment motions seeking a speedy resolution of claims they consider weak; while patients push for extended time for discovery in order to add strength to their claims. Health care professionals are certainly within their rights to attempt to move cases along through summary judgment motions.<sup>1</sup> By the same token, patients have a right to sufficient time for discovery in order to obtain the evidentiary materials needed to oppose a summary judgment motion. *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Byrd v. Hall*, 847 S.W.2d at 213; *Everett v. McCall*, No. E2000-02012-COA-R3-CV, 2001 WL 327918, at \*2 (Tenn. Ct. App. Apr. 3, 2001), *perm. app. denied* (Tenn. Oct. 8, 2001).

The trial courts are charged in these cases with striking an appropriate balance between the health care professional's desire for a speedy resolution of the case and the patient's need for adequate time to respond to a dispositive summary judgment motion. While efficient disposition of cases is certainly desired, courts may act too hastily in granting summary judgment motions. *See Calsonic Yorozu Corp. v. Forklifts Unlimited, L.L.C.*, No. M2000-02647-COA-R3-CV, 2002 WL 121612, at \*3 (Tenn. Ct. App. Jan. 30, 2002) (No Tenn. R. App. P. 11 application filed) (trial court erred in granting summary judgment less than three months after complaint filed without affording the non-moving party a reasonable opportunity to engage in discovery). In order to avoid hasty summary judgments, Tenn. R. Civ. P. 56.07 explicitly permits patients to seek, and trial judges to grant, continuances to obtain affidavits, depositions, or other discovery needed to oppose a summary judgment motion.

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<sup>1</sup> *See Byrd v. Hall*, 847 S.W.2d at 216 (“[T]here can be no doubt that summary judgment is a helpful device, in appropriate cases, for the just, speedy, and inexpensive resolution of litigation.”); *Willard v. Golden Gallon-TN, LLC*, 154 S.W.3d 571, 575 (Tenn. Ct. App. 2004); *Kenyon v. Handal*, 122 S.W.3d at 754 (“In this day and time, patients filing a medical malpractice case should reasonably anticipate that their claim will eventually be tested by a motion for summary judgment . . .”).

### C.

The question before us on this appeal is whether Ms. Grisham was afforded a reasonable opportunity to respond to Dr. McLaughlin's and Premier Orthopaedic's motion for summary judgment. Ms. Grisham insists that she was not, while Dr. McLaughlin and Premier Orthopaedic insist that Ms. Grisham was dragging her feet without good reason. We have concluded that Ms. Grisham has the better argument.

Dr. McLaughlin and Premier Orthopaedic filed their motion for summary judgment in November 2003 after the case had been pending for less than four months. Ms. Grisham's attorney apparently decided that he wished to depose Dr. McLaughlin before responding to the summary judgment motion but encountered delays in scheduling this deposition because Dr. McLaughlin declined to respond to his requests. When Ms. Grisham's lawyer noticed Dr. McLaughlin for a deposition, Dr. McLaughlin insisted that he would not be available until March 2004. Accordingly, at the scheduling conference in February 2, 2004, discovery deadlines were set, and the parties eventually agreed that both Dr. McLaughlin and Ms. Grisham would be deposed on March 11, 2004.

Dr. McLaughlin and Premier Orthopaedic continued their "hurry up" defense following his March 11, 2004 deposition. On March 12, 2004, they set a hearing on their summary judgment motion for March 26, 2004. By insisting on such a quick hearing, they left Ms. Grisham with fifteen days to (1) obtain a transcribed copy of Dr. McLaughlin's deposition from the court reporter, (2) obtain Dr. McLaughlin's signature on the deposition,<sup>2</sup> (3) provide her expert with a copy of Dr. McLaughlin's deposition, and (4) obtain and file her expert's affidavit opposing the motion for summary judgment. By the time of the March 26, 2004 hearing, it is not surprising that Ms. Grisham had not yet obtained an opposing affidavit from her medical expert in Atlanta, Georgia even though she had provided the expert with an unsigned copy of Dr. McLaughlin's deposition.

During the March 26, 2004 hearing, Ms. Grisham's lawyer presented valid reasons why he had been unable to obtain an affidavit opposing the motion for summary judgment by the time of the hearing and requested additional time to obtain this affidavit in accordance with Tenn. R. Civ. P. 56.07. The trial court denied the motion, not based on Ms. Grisham's lawyer's efforts to respond to the summary judgment motion but because "[t]he plaintiff did not initiate discovery in any form through calendar year 2003."<sup>3</sup> We find the trial court's emphasis on the discovery efforts immediately after the filing of the complaint was inconsistent with Tenn. R. Civ. P. 56.07 and that the trial court should have focused its attention on the adequacy of the efforts to obtain an opposing affidavit after the summary judgment motion was filed. The undisputed facts regarding the events occurring after Dr. McLaughlin and Premier Orthopaedic filed their summary judgment motion provide ample basis for granting Ms. Grisham additional time to obtain and submit an affidavit opposing the summary judgment motion. Accordingly, the trial court erred by granting the motion rather than continuing the hearing.

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<sup>2</sup>Dr. McLaughlin had declined to waive signature.

<sup>3</sup>Ms. Grisham filed her complaint on August 5, 2003. Thus, the period to which the trial court referred was less than five months.

**IV.**  
**THE DENIAL OF MS. GRISHAM'S TENN. R. CIV. P. 59.04 MOTION**

Ms. Grisham also asserts that the trial court erred by denying her Tenn. R. Civ. P. 59.04 motion requesting the court to revisit its early order granting Dr. McLaughlin and Premier Orthopaedic a summary judgment in light of Dr. Garber's May 3, 2004 affidavit. She insists that she had an acceptable justification for failing to file this affidavit prior to March 26, 2004 and that Dr. Garber's affidavit created a material factual dispute that prevented granting a summary judgment. Dr. McLaughlin and Premier Orthopaedic respond that Ms. Grisham's efforts were too little too late. We again agree with Ms. Grisham.

On May 4, 2004, Ms. Grisham filed her Tenn. R. Civ. P. 59.04 motion along with Dr. Garber's affidavit that had been completed the preceding day. Dr. McLaughlin and Premier Orthopaedic challenged the motion on essentially three grounds. First, they asserted that Ms. Grisham had failed to demonstrate due diligence in obtaining Dr. Garber's affidavit. Second, they asserted that Ms. Grisham could not use the difficulties in deposing Dr. McLaughlin as an excuse for failing to file Dr. Garber's affidavit because Dr. Garber did not rely on Dr. McLaughlin's deposition to prepare her affidavit. Third, they argued that the conclusions in Dr. Garber's affidavit were inconsistent with the theories of liability in Ms. Grisham's complaint. The trial court denied the Tenn. R. Civ. P. 59.04 motion based on its conclusion that Ms. Grisham had failed to show due diligence in obtaining Dr. Garber's affidavit and because Dr. Garber's conclusions were based entirely on Ms. Grisham's medical records.

Parties seeking relief from a trial court's decision to grant summary judgment may file a Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment. *Harris v. Chern*, 33 S.W.3d 741, 743 (Tenn. 2000). The motion should be granted when the controlling law changes before the judgment becomes final, when previously unavailable evidence becomes available, or when it becomes necessary to correct a clear error of law or to prevent injustice. A Tenn. R. Civ. P. 59.04 motion should not be used to raise or present new, previously untried or unasserted theories or legal arguments. *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

When a party uses a Tenn. R. Civ. P. 59.04 motion to present evidence that was not presented in the original proceedings, the courts should consider the following factors: (1) the moving party's efforts to obtain the evidence in responding to the summary judgment; (2) the importance of the new evidence to the moving party's case; (3) the moving party's explanation for failing to offer the evidence in responding to the summary judgment; (4) the unfair prejudice to the non-moving party; and (5) any other relevant consideration. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003).

Being able to produce an affidavit to oppose Dr. McLaughlin's and Premier Orthopaedic's summary judgment motion was essential to Ms. Grisham's case. Without it, Ms. Grisham's medical malpractice claim faced certain dismissal. We have already concluded in Section III of this opinion that Ms. Grisham demonstrated that she pursued Dr. Garber's affidavit diligently and in good faith. Thus, Ms. Grisham demonstrated satisfactorily that her efforts to obtain Dr. Garber's affidavit were adequate and that her explanation for her inability to obtain the affidavit prior to the March 26, 2004 hearing was cogent.



Dr. McLaughlin and Premier Orthopaedic, however, point to the trial court's observation that Ms. Grisham's reasons for the delay in obtaining Dr. Garber's affidavit did not ring true because Dr. Garber "placed no reliance on the March 11, 2004 deposition of Steven McLaughlin, M.D. in reaching her opinion." We respectfully disagree with this conclusion. Dr. Garber's affidavit states unequivocally that she based the opinions expressed in her affidavit on her "review of the medical records concerning the treatment of Lynda Grisham, the deposition testimony of Steven McLaughlin, and the deposition testimony of Lynda Grisham." At this stage of the proceeding, no conclusion can be drawn other than that considering Dr. McLaughlin's affidavit was a necessary ingredient in Dr. Garber's formulation of her opinion regarding Dr. McLaughlin's treatment of Ms. Grisham.<sup>4</sup>

As a final matter, Dr. McLaughlin and Premier Orthopaedic argue that Dr. Garber's affidavit is substantively insufficient to provide a basis for Tenn. R. Civ. P. 59.04 relief because the basis for Dr. Garber's opinion regarding Dr. McLaughlin's deviation from the recognized standard of professional practice differs from the theory of liability in Ms. Grisham's complaint. They argue that Ms. Grisham's complaint focuses on the manner in which Dr. McLaughlin performed the knee replacement surgery and that Dr. Garber's affidavit focuses on whether Dr. McLaughlin should have attempted to replace Ms. Grisham's knee in the first place. The trial court did not rest its decision on this ground, and for good reason. A fair reading of Ms. Grisham's complaint shows that it is broad enough to include the steps that Dr. McLaughlin took to determine whether Ms. Grisham was an appropriate candidate for knee replacement surgery in the first place. Accordingly, the basis for liability on which Dr. Garber's affidavit is based is aligned with Ms. Grisham's complaint.

## V.

We reverse the orders granting the summary judgment to Dr. McLaughlin and Premier Orthopaedic and denying Ms. Grisham's Tenn. R. Civ. P. 59.04 motion and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal jointly and severally to Steven G. McLaughlin and Premier Orthopaedic & Sports Medicine, PLC, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

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<sup>4</sup> We find nothing unreasonable or extraordinary in the notion that a patient in a medical malpractice case might desire to depose a defendant before responding to a summary judgment motion. It is quite conceivable that careful experts will withhold rendering an opinion based on medical records or supporting affidavits alone.